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No. 532

In the Supreme Court of the United States

OCTOBER TERM, 1957

THOMAS CAMPISI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. Ex. A 21–33; R. 79–89) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1957 (R. 90). The petition for a writ of certiorari was filed on October 7, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the failure of the judge to charge on the necessity of finding agreement or an overt act in the district of trial on a conspiracy count requires reversal of the conviction where there was no objec-

tion to the charge and ample evidence of numerous overt acts within the district of trial.

2. Whether petitioner was in double jeopardy because the conspiracy count charged as one of many overt acts a substantive offense of which he had previously been convicted.

3. Whether the admission of testimony that other members of petitioner's family were involved in criminal acts constituted prejudicial error under the circumstances of this case.

4. Whether there was sufficient evidence to support the conviction.

STATEMENT

In the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy and a substantive narcotic violation (R. 9–12, 75).[1] He was sentenced to consecutive terms of imprisonment of five years and a fine of $1,000, and three years and $1,000 (R. 75–76). On appeal, the judgment of conviction was affirmed (R. 90).

The evidence adduced at the trial may be summarized as follows:

Posing as a large narcotics operator, federal narcotics agent Zirilli, through a special employee, met co-conspirator Giampaoli, who worked in a restaurant in Long Island and lived in Queens County in the Eastern District of New York. In April 1955, he discussed with Giampaoli the possibilities of a sub-

[1] Petitioner was charged with co-conspirators Charles Campisi (his brother), Giampaoli, and Santagata. The latter two pleaded guilty.

stantial purchase of heroin (Tr. 3–6, 65–66)[2] but said he first wanted a sample (Tr. 8). Giampaoli delivered a sample of heroin the following day at the restaurant (Tr. 8–10). The next day, Zirilli went to Giampaoli's home. He discussed with him the inferiority of the sample, and also the price for a quarter kilogram of heroin. Giampaoli made a telephone call, and then told Zirilli that a quarter of a kilogram would cost $2,300, $2,000 of which would go to Giampaoli's "man" (Tr. 10–12).

On April 20, 1955, as charged in the substantive count of the indictment, this sale was made (Tr. 13). On that date, at Giampaoli's home, Giampaoli asked Zirilli to pay for the narcotics and said "that his source of supply was waiting for him." Zirilli paid the money (Tr. 14). They arranged to meet at the racetrack. There Giampaoli told Zirilli to come to his house for the heroin that evening (Tr. 15–16). Giampaoli left the racetrack and together with coconspirator Santagata drove to Kearny, New Jersey, where they met Charles Campisi and petitioner in their car. Petitioner entered Santagata's car and talked with the occupants and then returned to his own car. After some aimless driving by both cars, petitioner returned to Santagata's car and they drove to a building. Petitioner, Santagata, and Giampaoli entered the building. When they left the building, Giampaoli and Santagata returned to Giampaoli's home (Tr. 145–149), where Giampaoli gave a package

[2] The designation "Tr." refers to the typewritten transcript of the trial proceedings. It is being lodged with the Clerk of this Court.

to Zirilli (Tr. 17–18, 74–75). Upon analysis, the package was found to contain heroin (Tr. 18, 232).

On May 16, 1955, Zirilli indicated that he was ready to purchase more heroin. He met Giampaoli at his home on May 18, and told him that he was ready to purchase another quarter kilogram of heroin (Tr. 19). Giampaoli made a telephone call and arranged with Zirilli to deliver the narcotics to him at the restaurant later that day (Tr. 19–20). Accordingly, they met at Giampaoli's restaurant where Giampaoli, after a phone call, told Zirilli that his source of supply could not deliver the heroin until the next day (Tr. 20). The next day at the restaurant Giampaoli told Zirilli "there was no need for him to go to Newark since his man was going to have the heroin with him" (Tr. 20–21). At Giampaoli's instructions, the special employee drove Zirilli and Giampaoli to a store in Brooklyn. In the store, Zirilli met co-conspirator Santagata for the first time. They went to a nearby parking lot where Santagata took a package from his car and gave it to Zirilli (Tr. 21–22). Upon analysis, the package was found to contain heroin (Tr. 84–85; 231).

On May 25, 1955, Santagata told Zirilli that the Campisis in Newark were supplying the heroin for him and Giampaoli (Tr. 24–25).

In July 1955, Zirilli and Santagata left for Mexico for the ostensible purpose of obtaining heroin to smuggle into the United States (Tr. 26, 32, 95). Before Zirilli left, he introduced federal narcotics agent Tremoglie as his brother-in-law and as the one who was to take care of his narcotics business while he was

in Mexico (Tr. 27, 93, 95). Zirilli insisted that Tremoglie should be introduced to the Campisis to assure him that his business would be taken care of properly in his absence (Tr. 27–28, 65), and Giampaoli agreed (Tr. 67). On June 29, Tremoglie went with Santagata to Newark to get heroin. Santagata, however, took the money from Tremoglie and left Tremoglie in the car. He returned shortly with the heroin (Tr. 28–29, 30–31, 87, 96–101, 232).

Zirilli insisted that Tremoglie had to be introduced to the source of supply before he left for Mexico. Santagata demurred but later said that he would take Tremoglie "to the Campisis in Newark" (Tr. 31–32, 102). On July 19, Tremoglie and Giampaoli drove to petitioner's home. There petitioner took a package from under a seat cushion of a chair and gave it to Tremoglie. On this occasion, Tremoglie asked petitioner if "this stuff [is] as good as the stuff I bought last time" (June 29) when he came with Santagata. Petitioner replied "Yes, the same thing. I had a piece and I broke it in four and this is one of the other four pieces." He also gave Tremoglie some advice on retailing heroin (Tr. 104–107). He requested that Giampaoli and Tremoglie leave his home separately because "It looks funny for two guys to walk out of the house", and told Tremoglie to put the package in his pocket (Tr. 107). Upon analysis, the package was found to contain heroin (Tr. 108, 232).

A warrant for petitioner's arrest was issued in the Eastern District of New York in August 1955, but the federal officials were unable to execute it (Tr. 138, 139, 140). Petitioner was arrested in January 1956,

in his Newark residence by the local police. At that time, the local police were looking for petitioner's son, Peter, in connection with a local robbery. In executing a search warrant for the premises, they found petitioner hiding under a bed. In that room, they found a suit of clothes, which contained narcotics paraphernalia. Because petitioner was acting suspiciously, the police officers kept him under observation while they were waiting for Peter to come home. During that time, petitioner attempted unsuccessfully to escape from the officers by jumping through an open window to the roof of the garage (Tr. 204–210, 212–218).

ARGUMENT

1. In its charge to the jury on the conspiracy count, the court stated that petitioner and his co-conspirators were charged "within the Eastern District of New York" with conspiring to violate the federal narcotic laws. It defined conspiracy as an agreement between two or more persons and read the 11 overt acts charged in the indictment as having been committed by petitioner and his co-conspirators. Of the 11 acts, five were alleged to have been committed in the Eastern District of New York. Petitioner was named in one (R. 65–69). The court also told the jury that in order to find petitioner guilty it must find the existence of such agreement, that petitioner participated in it, and that at least one of the overt acts in furtherance of the conspiracy was committed. Petitioner, who made no request as to any further instruction on venue, now complains (Pet. 6–9) of the court's failure to go further and instruct precisely that the jury must

find that one of the overt acts or the formation of the conspiracy took place in the Eastern District of New York.

No issue with respect to venue was raised at the trial. There was ample evidence that overt acts in furtherance of the conspiracy occurred in the Eastern District of New York. Indeed, the second overt act alleged was the sale on April 20, 1955, in the Eastern District, which formed the basis of the substantive count on which petitioner was convicted. The court below, therefore, properly held that petitioner's failure to object at the trial precluded the raising of the issue on appeal. Rule 30, F. R. Crim. P.; *United States* v. *Trenton Potteries*, 273 U. S. 392, 402–404.

2. Prior to his conviction on the indictment in this case, petitioner was convicted in the United States District Court for New Jersey of narcotics violations in connection with the sale to Tremoglie on July 19, 1955 (Pet. Exs. B and C, 34, 36–37). This sale and the concealment of the narcotics sold were also charged as overt acts 10 and 11 in this case. Petitioner claims (Pet. 9–10) double jeopardy as a result of the two convictions. But it is well established that the substantative crime and conspiracy are separate offenses punishable by separate sentences. *Pereira* v. *United States*, 347 U. S. 1, 11; *Pinkerton* v. *United States*, 328 U. S. 640, 643–644; *United States* v. *Crowe*, 188 F. 2d 209 (C. A. 7); *Colosacco* v. *United States*, 196 F. 2d 165, 168 (C. A. 10).

3. Petitioner contends (Pet. 10–15) that, over his objection, prejudicial irrelevant testimony was introduced at the trial.

a. Testimony was introduced that the local police visit to the Campisis was in connection with the implication of petitioner's son Peter in a local robbery (Pet. 13; R. 59; Tr. 208, 219). The jury at that point was immediately told by the court to disregard that statement (R. 59; Tr. 208, 219). In addition, the court in its final charge told the jury (R. 64) "Disregard all evidence which the court ordered stricken out." Government counsel also requested the jury to disregard testimony regarding Peter's arrest (R. 73–74). It is presumed that the jury followed the court's instructions. *Delli Paoli* v. *United States,* 352 U. S. 232, 242; *Opper* v. *United States,* 348 U. S. 84, 95.

b. During Agent Zirilli's testimony in answer to a question by the prosecutor whether he had a conversation with Santagata about a man named "Compy", Zirilli replied (Tr. 25):

> During this conversation with Santagata I told him that I had read in the newspaper about a man named Compy who had been murdered in Newark. He said that he knew the man. He knew the whole family, that in fact the name of the man was Campisi and that they were the people we were doing business with in Newark.
>
> * * * * *
>
> Santagata continued to say that he could not get pure heroin from these people because they were four brothers and they had many mouths to feed and he said we can't blame them for adulterating the heroin because there are so

many mouths to feed and so much money to be paid out.

The identification of the source of supply by one conspirator to his customer during the life of the conspiracy was admissible evidence. The incidental reference to petitioner's brother was part of the whole conversation.

c. Testimony as to petitioner's attempted escape (see the Statement, *supra*, p. 6) was, under the authorities cited by petitioner himself, admissible as tending to show guilt (Pet. 13–14). See also *Allen* v. *United States*, 164 U. S. 492, 499; *Shelton* v. *United States*, 169 F. 2d 665, 668 (C. A. D. C.), certiorari denied, 335 U. S. 834.

d. In the room where petitioner was found under the bed during the search pursuant to a warrant by New Jersey police, the officers also found narcotics paraphernalia in a suit. When questioned, petitioner denied that the suit and the paraphernalia belonged to him. However, since petitioner was found in the same room in a state of partial undress, the jury had the right to infer that the paraphernalia did belong to him, and to consider this for what it was worth as evidence of petitioner's implication in narcotics transactions.

4. Petitioner's attack on the sufficiency of the evidence on both counts is refuted by the record. See the Statement, *supra*. The evidence was fully reviewed by the court below (Pet. 23–30), and found sufficient on both counts.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1957.